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Supreme Court, U.S.
FILED
NOV 29 1996
CLERK

No. 95-2074

In The

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO, AND UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE SAN ANTONIO CONSERVATION SOCIETY, THE MUNICIPAL ART SOCIETY, AND THE NATIONAL ALLIANCE OF PRESERVATION COMMISSIONS AS *AMICI CURIAE* SUPPORTING PETITIONER

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November 29, 1996

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QUESTION PRESENTED

Amici will address the following question:

Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, exceeds Congress's power under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

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INTEREST OF THE AMICI CURIAE

The San Antonio Conservation Society ("Society") is one of the oldest historic preservation and conservation advocacy organizations in the Nation. The Society is a 3,000-member organization funded primarily by fundraising events, real estate rentals, and admissions fees. Its purposes are to

preserve and to encourage the preservation of historic buildings, objects, places, and customs relating to the history of Texas, its natural beauty, and all that is admirably distinctive to the State; by such physical and cultural preservation to keep the history of Texas legible and intact; and to educate the public, especially the youth of today and tomorrow, with knowledge of inherited regional values.

Throughout its history, the Society has advocated and supported the maintenance of historical and cultural landmarks in correspondence, in statements in public fora, and in the state and federal court systems. The City of Boerne is adjacent to San Antonio, and the Society's Board of Directors has included members of St. Peter Church. The Society became involved in this case because of the Church's desire to demolish most of the building and retain only the towers and facade, which would be incorporated into a much larger new structure. The Church is of historical and cultural value to the community of Boerne. The building, a fine example of the "Mission Revival" style, echoes Mission Concepcion in San Antonio, as well as elements of Mission Carmel in California and the Alamo. The prominent site of the Church increases its contribution to the character of the City's historic district.

For more than a century, the Municipal Art Society ("MAS") has campaigned to preserve the best of New York City's past and to promote excellence in urban design and planning. The MAS is a private, non-profit membership corporation founded by a group of architects, artists, and civic leaders. Its advocacy efforts led to adoption of the Nation's first zoning ordinance in 1916, and the pioneering landmarks preservation law in 1965. The MAS has inspired the creation of many civic and preservation organizations in New York City and across the Nation. The MAS brings together civic groups, government, and private developers to share ideas, resolve differences, and inform the public. The MAS

maintains expertise in historic preservation and urban planning through its Board members and through committees that include approximately 75 professionals from the fields of preservation, architecture, landscape architecture, and urban planning.

The National Alliance of Preservation Commissions ("Alliance") is a non-profit public interest corporation established by a network of local preservation commissions in 1983. The Alliance's mission is to encourage architectural, cultural, and historic preservation in the United States by providing technical assistance to and advocating for local preservation commissions. The Alliance has 682 members in all 50 States, Puerto Rico, and the Virgin Islands, including 289 preservation commissions. In addition to its membership, the Alliance regularly communicates with more than 2,000 preservation commissions nationwide.

The conflict between Boerne and the Archdiocese of San Antonio is representative of many disagreements between *amici* and religious organizations over the destruction of historical and cultural landmarks. In passing the Religious Freedom Restoration Act (the "RFRA" or the "Act"), 42 U.S.C. § 2000bb, Congress stepped into the middle of these quintessentially local disputes. In so doing, Congress overstepped the limits of its constitutional authority.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The RFRA was designed to supersede a 1990 decision of this Court interpreting the Free Exercise Clause. The Act is extremely broad in scope, and applies to matters of purely local concern, including disputes over the future of historically and culturally significant places of worship.

The Constitution confers limited and enumerated powers on the federal government, and reserves all remaining powers

to the States or to the people. Although Congress justified the RFRA as an exercise of its power to enforce the provisions of the Fourteenth Amendment, the Act does not "enforce" any provision of that Amendment. Although the Court has sustained other statutes passed pursuant to Congress's power to enforce the Civil War Amendments, those cases are readily distinguishable.

The RFRA is repugnant to basic principles of federalism. Congress has expressly reserved the right to exempt its own legislation from the Act, which undermines its claim to be enforcing the First Amendment. Additionally, if the Act is constitutional, virtually no arena of state and local self-governance is immune from federal intrusion.

The federal system is designed so that States may experiment in local policy, within the boundaries of what is permitted by the Constitution. It is the judiciary's role to keep Congress from exceeding its enumerated powers. Congress overstepped its authority in enacting the RFRA, and thus the Act must be invalidated.

ARGUMENT

I. THE RFRA INTRUDES SUBSTANTIALLY INTO MATTERS OF LOCAL CONCERN.

A. The Act Grants Religious Entities A Sweeping Exemption From Constitutionally Permissible State And Local Laws.

In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that the Free Exercise Clause does not require religious exemptions from neutral laws of general applicability. The RFRA is "a direct response" to the Court's decision in *Smith*. *Flores v. City of Boerne, Texas*, 73 F.3d 1352, 1361 (5th Cir. 1996). *See* S. Rep. No. 111, 103d Cong., 1st Sess. 12 (1993) ("[T]he purpose of this act [was] only to overturn the Supreme Court's decision in *Smith*.").

The Act "seeks to return the courts . . . to the approach they had taken before *Smith*," *Sasnett v. Sullivan*, 91 F.3d 1018, 1019 (7th Cir. 1996), *petition for cert. filed* (Oct. 29, 1996), by expressly announcing its design to "restore the compelling interest test of *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. 2000bb(b)(1).[1]

The RFRA decrees that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a). An exception is provided if the government in question "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

The RFRA is breathtakingly broad in scope. By definition, "government" includes any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State." 42 U.S.C. § 2000bb-2(1). Moreover, the Act applies "to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [its enactment]." 42 U.S.C. § 2000bb-3(a). The Act thus applies to all forms of law at every level of government.

In short, Congress has granted religious entities a sweeping statutory right to exemption from neutral and

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[1] As petitioner explains, *see* Pet. 15, the RFRA actually requires more of States and local governments than many pre-*Smith* cases.

generally applicable laws of all kinds, even though the Free Exercise Clause does not require such exemptions.[2]

B. The Act Is Likely To Have A Profound Impact On Efforts To Conserve Historic Places Of Worship.

The RFRA federalizes local disputes over the conservation of historic places of worship. Enforcement of historic preservation laws traditionally has been a matter of state and local concern. *See generally Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 107-115 (1978). Although the details vary, the basic features of historic preservation laws are similar from community to community across the country. Typically, a state or local government body passes a law establishing a preservation commission and granting it authority to designate buildings or areas as historically significant. The law generally limits physical alternations of buildings or land so designated, in order to preserve their historic nature. For example, substantial alterations usually require special permission, which is given only if measures are taken to preserve the object's historic nature.

Many places of worship in this country are historically and architecturally significant, and these places often become the focus of commission attention. Religious organizations, however, often seek exemption from historic preservation laws. In some instances, the local commission agrees that a religious exemption is warranted; in others it disagrees. In some instances, an appeal to a city council or mayor is taken,

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[2] That Congress's special solicitude extends only to persons claiming a conflict due to a *religious* commitment, and not to persons facing a conflict due to an equally serious *secular* commitment, raises additional concerns about a possible affront to the Establishment Clause. *See* Christopher V. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. Rev. 437, 453-54 (1994).

with varying results. These disputes, which may evoke strong personal reactions from voices within the community, are quintessentially local in nature.[3] Resolution of these disputes through the political process reflects a balance between a region's cultural heritage and its religious community.

Prior to the enactment of the RFRA, religious organizations, armed only with the Free Exercise Clause, frequently lost when they carried disputes over zoning or historic preservation into federal court. *See, e.g., First Assembly of God v. Collier County, Fla.*, 20 F.3d 419, *modified*, 27 F.3d 526 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 730 (1995) (post-RFRA, without an RFRA claim); *Rector, Wardens and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (post-*Smith* but pre-RFRA); *Christian Gospel Church v. City and County of San Francisco*, 896 F.2d 1221 (9th Cir.), *cert. denied*, 498 U.S. 999 (1990) (pre-*Smith*); *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983) (pre-*Smith*). Armed with the RFRA, however, religious organizations now insist that Congress has granted them virtually complete exemption from historic preservation laws. In San Antonio, for example, that is precisely the position taken by counsel for the First Presbyterian Church before the San Antonio Historic and Design Review Commission. Thus, the RFRA may

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[3] *See, e.g.*, Lynell Burkett, *When Church and City Collide*, San Antonio Express News, July 28, 1996; Lynell Burkett, *Church vs. City: All Went Wrong*, San Antonio Express News, August 4, 1996; Christopher Anderson, *First Presbyterian Has History Entwined Deep in Alamo City*, San Antonio Express News, February 9, 1996; Ed Lane, *New Flap Raised About Homes Near Trinity Baptist*, San Antonio Light, May 30, 1991; Craig Donegan, *Church, Historical Group, May End Feud*, San Antonio Express News, May 31, 1991.

render local communities unable to prevent the destruction of historically important structures, and unable to enforce zoning laws against religious organizations.

II. CONGRESS'S POWER TO "ENFORCE" THE PROVISIONS OF THE FOURTEENTH AMENDMENT DOES NOT EXTEND TO DEFINING THE MEANING OF THE AMENDMENT'S SUBSTANTIVE PROVISIONS.

The "Constitution created a Federal Government of limited powers." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Because the Constitution is "an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833). The Tenth Amendment confirms that any power not expressly delegated to the United States is retained by the States. *See* U.S. Const. amend. X; *New York v. United States*, 505 U.S. 144, 156-57 (1992); *see also United States v. Lopez*, 115 S. Ct. 1624, 1646 (1995) (Thomas, J., concurring).

In enacting the RFRA, Congress invoked on Section 5 of the Fourteenth Amendment, which provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[4] U.S. Const. amend. XIV, § 5. The Court has held that the Due Process Clause of the Fourteenth Amendment incorporates the Free Exercise Clause

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[4] Congress did not purport to be legislating under its commerce power. *See* U.S. Const. art. I, § 8. Nor could it have. By its terms, the Act applies to any person, anywhere, burdened by any sort of law. It thus applies in situations that do not "substantially burden interstate commerce," as well as in those that do. *See generally United States v. Lopez*, 115 S. Ct. 1624 (1995) (Congress may not, under the cloak of the Commerce Clause, regulate practices that do not substantially burden interstate commerce).

of the First Amendment, which is thus applicable to the States. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Congress thus justifies the RFRA as a measure to "enforce, by appropriate legislation," the Free Exercise Clause.

The ordinary meaning of "to enforce" is "to compel observance of or obedience to." American Heritage Dictionary 432 (1971).[5] Thus, Congress has the power to enact legislation compelling the States to observe or obey the dictates of the Free Exercise Clause. It does not, however, have power to expand or contract the substantive requirements of that Clause.

The scope — and limits — of the power to "enforce" the substantive provisions of the Constitution may be illustrated by considering a different constitutional provision, the Ex Post Facto Clause of Article I, Section 10. The Ex Post Facto Clause provides that "No State shall . . . pass any . . . ex post facto law." To be sure, the Constitution does not provide that Congress has the power to enforce the Ex Post Facto Clause by appropriate legislation. But assuming that it did, any number of federal statutes would constitute legitimate exercises of that power. For example, Congress might enact legislation providing a means to overturn a conviction obtained by a State pursuant to an ex post facto law. Or Congress might enact a statute providing for civil damages against the offending state officials. Congress might also provide for the imposition of federal criminal sanctions against state officials who knowingly apply ex post facto laws. Or Congress might pass legislation providing for removal to federal court of any state criminal trial proceeding under an ex post facto law. *See*

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[5] *See also* Webster's Third New International Dictionary 751 (1993) ("to give force to," "to put in force: cause to take effect"); The Oxford English Dictionary E171 (1971) ("to compel the observance of") (definition 14); Random House Dictionary of the English Language 473 (1966) ("to put or keep in force; compel obedience to").

generally William Van Alstyne, *An Essay on the Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment*, 46 Duke Law Journal ___, ___ n.24 (1996) (forthcoming). Thus, the power to enforce a constitutional provision by appropriate legislation is far from insignificant.

But the power to enforce the Ex Post Facto Clause plainly is *not* the power to expand or contract the substantive requirements of the Clause. The Ex Post Facto Clause prohibits application of a state criminal law to an act committed prior to enactment of the law, but it does not prohibit application of a law to an act committed immediately following enactment. *See generally Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). Suppose Congress were to conclude that the Court's interpretation of the Ex Post Facto Clause is insufficiently protective of criminal defendants. Suppose further that Congress, acting pursuant to its assumed power to "enforce" the Ex Post Facto Clause, were to enact a statute mandating that "no criminal law shall be applied to any act committed prior to its enactment into law, *or for 30 days thereafter.*" Suddenly, despite the fact that the Supreme Court has definitively pronounced that the Ex Post Facto Clause does not prohibit a State from enforcing its criminal laws immediately upon passage, Congress has presumed to "enforce" that very same passage by *preventing* the State from doing just that. This is illogical, to say the least. Yet that is exactly what Congress has done in passing the RFRA.[6]

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[6] The same objection would apply if Congress attempted to allow the States to do what the Ex Post Facto Clause forbids, by, for example, enacting a statute allowing new criminal laws to be applied to acts committed up to 30 days before the statute was enacted.

III. THE *MORGAN* LINE OF CASES DOES NOT REQUIRE THE COURT TO UPHOLD THE RFRA.

A. *Morgan* Does Not Require The Court To Uphold The RFRA.

In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court sustained a federal statute enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. Although *Morgan* has been subjected to sustained judicial and scholarly criticism,[7] the case is readily distinguishable from this case, and thus the Court need not overrule *Morgan* in order to hold that the RFRA exceeds Congress's power under Section 5.

As an initial matter, the statute at issue in *Morgan*, § 4(e) of the Voting Rights Act of 1965, did not purport to supersede a decision of this Court. Section 4(e) generally precluded the States from imposing an English literacy requirement on voters who had completed the sixth grade in an "American-flag school" in which the predominant classroom language was not English. 384 U.S. at 643 n.1. Although the Court had earlier held that North Carolina's literacy requirement was not *on its face* violative of the Equal Protection Clause, *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959), the Court's opinion in *Morgan* was careful to note that *Lassiter* had not decided whether New York's literacy requirement, *as applied* to persons covered by § 4(e), violated the Equal Protection Clause. *See* 384 U.S. at 649; *see also Cardona v. Power*, 384 U.S. 672, 675 (1966) (Douglas, J., dissenting) (distinguishing *Lassiter* and concluding that New York's literacy requirement, as applied to Spanish-speaking

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[7] *See, e.g.*, *Morgan*, 384 U.S. at 668 (Harlan, J., dissenting); Alexander Bickel, *The Voting Rights Cases*, 1966 Supreme Ct. Rev. 79, 95-102

persons, violates the Equal Protection Clause). In the RFRA, in contrast, Congress addressed the precise constitutional issue decided in *Smith*, and purported to supersede that decision by legislation. The posture of the RFRA thus differs substantially from that of the statute at issue in *Morgan*.

Four years after *Morgan*, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), a majority of the Court struck down a provision of the Voting Rights Act that enfranchised 18-year-olds in state elections. In so doing, the Court suggested that *Morgan* does not extend to a statute such as the RFRA.

Justice Black's opinion in *Oregon v. Mitchell* emphasized that "Congress may only 'enforce' the provisions of the amendments and may do so only by 'appropriate legislation.'" 400 U.S. at 128. Justice Black linked the Section 5 enforcement power to the historical context of the Civil War Amendments. "Above all else, the framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race." 400 U.S. at 126. Accordingly, "[w]here Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Oregon v. Mitchell*, 400 U.S. at 129. It was largely the absence of a link with racial discrimination that led Justice Black to conclude that Congress lacked power to enfranchise 18-year-olds in state elections. *See id.* at 130.

Justice Harlan, dissenting in part and concurring in part, reaffirmed his position in *Morgan*, *see* 400 U.S. at 204 n.86, and argued that it is not up to Congress to define the scope of its own powers. Congress's view that it has the authority to enact particular legislation

> cannot displace the duty of this Court to make an independent determination whether Congress has exceeded its powers. The reason for this goes beyond Marshall's

> assertion that: 'It is emphatically the province and duty of the judicial department to say what the law is.' It inheres in the structure of the constitutional system itself.

Id. at 204 (Harlan, J., concurring in part and dissenting in part) (citation omitted).

Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, added that *Morgan* "made clear that Congress could impose on the States a remedy for the denial of equal protection that elaborated upon the direct command of the Constitution, and that it could override state laws on the ground that they were in fact used as instruments of invidious discrimination even though a court in an individual lawsuit might not have reached that factual conclusion. But it is necessary to go much further to sustain § 302 . . . Unlike the statute considered in *Morgan*, § 302 is valid only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, *but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause.*" *Oregon v. Mitchell*, 400 U.S. at 296 (Stewart, J., concurring in part and dissenting in part) (emphasis added) (citation omitted). Justice Stewart concluded that Congress lacked such power. *Id.*[8]

In *City of Rome v. United States*, 446 U.S. 156 (1980), the Court expressed a similarly limited view of Congress's enforcement power under § 2 of the Fifteenth Amendment.

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[8] The Solicitor General suggests that *Oregon v. Mitchell* is distinguishable because the Constitution expressly confirms that the States have power to impose voting qualifications. *See* U.S. Br. in Opp. 14, citing U. S. Const. art I, § 2. The Solicitor General points out that the Constitution does not expressly grant the States similar power over local zoning matters. Of course, no such express confirmation of the state's power is required. *See* U.S. Const. amend. X.

The Court explained that Congress, "after making an extensive investigation, . . . determined that its earlier attempts to remedy the 'insidious and pervasive evil' of racial discrimination in voting had failed because of 'unremitting and ingenious defiance of the Constitution,'" that "[c]ase-by-case adjudication had proved too ponderous a method to remedy voting discrimination," and that when adjudication "produced favorable results, affected jurisdictions 'merely switched to discriminatory devices not covered by the federal decrees.'" 446 U.S. at 174, quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 314 (1966).

Cases such as *Oregon v. Mitchell* and *City of Rome* indicate that Congress's Section 5 power is limited in at least three respects. *See* William Van Alstyne, *An Essay on the Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment*, 46 Duke Law Journal ___, ___ n.47 (1996) (forthcoming). *First*, Congress must identify a specific problem, such as the use of literacy tests. *Second*, Congress must exercise its special competence to determine relevant facts (*e.g.* the prevalence of literacy tests, the extent to which they are used as a device to accomplish unconstitutional discrimination, and the extent to which case-by-case adjudication provides an inadequate remedy for constitutional violations). *See Morgan*, 384 U.S. at 656; *Oregon v. Mitchell*, 400 U.S. at 131-34 (opinion of Black, J.); *id.* at 246-50 (opinion of Brennan, J., concurring in part and dissenting in part). *See also Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980). *Third*, Congress must confine itself to enacting a specific remedy for the problem it has identified. *See City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 490 (1989) ("Congress may identify *and redress* the effects of society-wide discrimination . . .") (emphasis added). Congress *may* remedy constitutional violations that are difficult to detect or prove; however, it is a logical

prerequisite that there be a constitutional violation. That, as always, is a question for the Court.

The RFRA plainly exceeds these limitations. Congress did not identify a specific constitutional problem, such as invidious use of facially neutral laws. Instead, Congress superseded a decision of this Court interpreting the Constitution, because it disagreed with that decision. Nor did Congress exercise its special fact-finding competence. *See* Joanne Brant, *Taking the Supreme Court At Its Word: The Implications for RFRA and Separation of Powers*, 56 Mont.L.Rev. 5, 7 (1995). Finally, the RFRA also exceeds Congress's remedial power under Section 5. Rather than identifying a category of constitutional violations that cannot be remedied through case-by-case adjudication, Congress simply decreed that religious organizations shall be entitled to a blanket exemption from *all* state and local laws.

B. The Power To Enforce The Other Civil War Amendments Has Not Been Construed Broadly Enough To Support The RFRA.

Morgan and *Oregon v. Mitchell* considered Congress's power under Section 5 of the Fourteenth Amendment. *City of Rome* addressed and sustained the constitutionality of a statute enacted pursuant to nearly identical language in Section Two of the Fifteenth Amendment; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) and *Runyon v. McCrary*, 427 U.S. 160 (1976), addressed, and in each case sustained, statutes enacted pursuant to similar language in the Thirteenth Amendment. As noted above, *City of Rome* concerned a "proper" exercise of the *Morgan*-power — that is, Congress exercised its special factfinding competence to identify a practical problem and enacted a legislative remedy for that problem. The statutes sustained in *Jones* and *Runyon* (both decided after *Morgan*) are like and yet unlike the *Morgan* statute. Regardless, they are wholly *unlike* the RFRA.

The statute at issue in *Jones* provided that "all citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982. The statute at issue eight years later in *Runyon v. McCrary* prohibited racial discrimination in the making and enforcing of private contracts. 42 U.S.C. § 1981. These statutes are, to be sure, broad and general — in that respect more like the RFRA than like the *Morgan* statute. At the same time, they fall squarely within the historical context of the Civil War Amendments, our nation's experience with the institution of slavery, and its "badges and incidents," which are implicated by Section 1 of the Thirteenth Amendment. *See Civil Rights Cases*, 109 U.S. 3 (1883). The Court's elaborate discussion in *Jones* of the *substantive* section of the Thirteenth Amendment, the history of "Black Codes," and the systematic exclusion of black Americans from white communities, reinforces the conclusion that, like the statutes at issue in *Morgan* and *City of Rome*, these statutes were *remedial* in nature. *See Jones*, 392 U.S. at 426-37; *id.* at 444-47 (Douglas, J., concurring).

The RFRA has little in common with any of these statutes, and thus cases decided under the Thirteenth and Fifteenth Amendments do not support the proposition that the RFRA is within Congress's power under Section 5 of the Fourteenth Amendment.

IV. THE RFRA IS CONTRARY TO BASIC PRINCIPLES OF FEDERALISM.

A. By Expressly Reserving The Right To Exempt Itself From The RFRA, Congress Has Undermined Any Argument That It Is Enforcing The First Amendment.

The RFRA expressly provides that "Federal statutory law adopted after November 16, 1993 is subject to this chapter *unless such law explicitly excludes such application by*

reference to this chapter." 42 U.S.C. § 2000bb-3(c) (emphasis added). No such privilege is accorded to the States or local governments. Congress plainly lacks power to exempt itself from the requirements of the Free Exercise Clause. By reserving the possibility that the RFRA will not apply to federal legislation, Congress has implicitly acknowledged that RFRA is not merely enforcing the requirements of the Free Exercise Clause.

Congress's reservation of power to exempt itself from the RFRA, while according no such exemption to the States, offends basic principles of federalism. *See EEOC v. Wyoming*, 460 U.S. 226, 263 (1983) (Burger, J., dissenting, joined by Rehnquist, Powell, and O'Connor, JJ.) (suggesting that Congress has no Section 5 power to forbid practices that it authorizes the federal government to engage in). The RFRA would, for example, permit Congress to enact drug control laws that are not subject to the RFRA, while forbidding an identical state law, even though the state law comports with the requirements of the Constitution.

B. If The RFRA Is Within Congress's Power, There Is Virtually No Arena Of State Or Local Governance That Is Immune From Federal Interference.

If the RFRA is a constitutional exercise of Congress's power under Section 5, it follows that Congress has effectively unlimited power to interfere with state and local government under the guise of "enforcing" the Fourteenth Amendment. Two examples of RFRA-type statutes, one concerning obscenity and the other concerning the minimum size of juries, illustrate this point. *See* William Van Alstyne, *An Essay on the Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment*," 46 Duke Law Journal ___ (1996) (forthcoming) (providing a series of examples, including the two elaborated below).

The Court has determined how far the States may go, consistent with the First and Fourteenth Amendments, in enacting anti-obscenity laws and ordinances. *See Miller v. California*, 413 U.S. 15 (1973). If a film is obscene under the *Miller* criteria, it is not entitled to First Amendment protection, and state or local authorities can ban it. But if Congress were to conclude that *Miller* is insufficiently protective of free expression, it would be free under the RFRA theory of Section 5 to "enforce" its view of the First Amendment by decreeing that States and local communities may not censor materials that would constitute "obscenity" under the *Miller* standard. Declaring itself to be "augmenting" the values of the First Amendment, Congress could step in and dictate what the individual community must permit — despite this Court having said that the community is complying fully with the First Amendment. Surely that is not what Section 5 was intended to permit. As the Court has noted, "it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves." *Oregon v. Mitchell*, 400 U.S. 112, 127 (1970).

A second example confirms the conclusion that Congress has exceeded its Section 5 power. This Court has held that the Sixth Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment, requires that no criminal trial jury may consist of fewer than six jurors. *See Ballew v. Georgia*, 435 U.S. 223 (1978). Thus, a State that chooses to empanel eight-person juries for all felony trials complies fully with the requirements of the federal Constitution. If Congress were to decide that *Ballew* somehow is insufficiently protective of a criminal defendant's rights to a fair trial and due process of law, Congress might, under the RFRA theory of Section 5, enact a statute requiring the States to empanel twelve- or fourteen-person juries, in their own courts, in the enforcement of their own criminal

statutes, despite the fact that their prior practice comported fully with the Constitution. This cannot be consistent with the Constitution, which "has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions." *New York v. United States*, 505 U.S. 144, 162 (1992).

C. Congress Lacks Power To Enact Legislation Defining The Substantive Scope Of Incorporated Rights, Including In Particular The First Amendment.

There can be no dispute that "the Civil War Amendments . . . worked a dramatic change in the balance between congressional and state power over matters of race." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989). But *Morgan* and the Voting Rights Act cases speak only to Congress's power vis-à-vis the Equal Protection Clause.

Even if the Court were to conclude that Congress has power to define the substantive scope of that Clause, it should not take the additional step of concluding that Congress has the power to define the scope of incorporated rights. The Bill of Rights was originally directed to the federal government, and only later applied to the States. It would be a strange reversal of this history if the Congress were now permitted to define the substantive scope of those rights. Consequently, it is far from clear that Congress has "the same enforcement power under § 5 with respect to a constitutional provision which has merely been judicially 'incorporated' into the Fourteenth Amendment that it has with respect to a provision which was placed in that Amendment by the drafters." *Hutto v. Finney*, 437 U.S. 678, 717-18 (1978) (Rehnquist, J., dissenting); *see also Hamilton v. Schriro*, 74 F.3d 1545, 1563 (8th Cir.), *cert. denied*, 117 S. Ct. 193 (1996) (McMillian, J., dissenting) ("An argument could be made, based on both historical perspective and the logic of the doctrine of

incorporation itself, that Congress's power to enforce incorporated rights under § 5 should be circumscribed.").

That argument applies with particular force to the First Amendment, which is expressly framed as a *limitation* on Congressional power. "Congress shall make *no law*," the First Amendment provides, "respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. No other provision in the Bill of Rights is framed this way. Accordingly, Congress's Fourteenth Amendment power to "enforce" the First Amendment may be viewed as more circumscribed than its power to "enforce" the other incorporated amendments, which do not begin with the command that "Congress shall make no law."

V. THE GROUNDWORK HAS BEEN LAID FOR THIS COURT TO INVALIDATE THE RELIGIOUS FREEDOM RESTORATION ACT.

A. The Federal System Permits The States To Experiment In Local Policy, Within The Boundaries Established By The Constitution.

The Constitution ratified by the States was carefully drafted to protect them from undue intrusion by the federal government. Thus, the instrument provides the federal government only with a well-defined list of powers. The States retain all remaining powers, reflecting the fact that the States came into the Union as independent and complete entities. *See Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869) ("The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.").

Although the States retain all powers not expressly ceded to the federal government, the Constitution provides for some restraints on the States, both in the original document (*e.g.*, the Ex Post Facto Clause of Article I, Section 10) and in the amendments (*e.g.*, the Eighth Amendment, which constrains

the States by virtue of its incorporation in the Due Process Clause of the Fourteenth Amendment). If a State, acting pursuant to its retained power, contravenes none of these provisions, it is free to do as it pleases. That is the message of the Tenth Amendment. As Justice Brandeis pointed out earlier in the century, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The RFRA effectively prevents States and local communities from the experimentation that is a fundamental corollary to our being a Union of indestructible states. If San Antonio should wish to preserve for future generations religious buildings dating from the 18th and 19th centuries that reflect our regional heritage, and New York should choose to remodel such buildings to accommodate expanding congregations, and if both scrupulously follow the dictates of the Constitution, each is free to do as it pleases. It is not Congress's place, in our constitutional system, to say otherwise.

B. It Is The Judiciary's Role To Keep Congress Within Its Enumerated Powers.

As Judge McMillian of the Eighth Circuit pointed out, "the language of [the congressional findings that accompany the act] portrays Congress . . . as a super-Supreme Court." *Hamilton v. Schriro*, 74 F.3d 1545, 1566 (8th Cir.), *cert. denied*, 117 S. Ct. 193 (1996) (McMillian, J., dissenting). But ours is a system of separated powers, and that is not the

role of Congress.[9] "It is emphatically the province and the duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). And it is the role of the judiciary to keep Congress within its enumerated powers. *See id.* at 176 ("The powers of the legislature are defined and limited. . . . To what purposes are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"). Recent decisions of this Court have invalidated legislation that oversteps Congress's powers under the Constitution. *See, e.g.*, *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996); *United States v. Lopez*, 115 S.Ct. 1624 (1995); *New York v. United States*, 505 U.S. 144 (1992). The RFRA, like the statutes at issue in those cases, should be invalidated because it exceeds Congress's power under the Constitution.

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[9] *See Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("There is no doubt that if there were a super-Supreme Court, a substantial proportion of our [decisions respecting what the states may or may not do consistent with the Fourteenth Amendment] would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.").

CONCLUSION

The judgment of the court of appeals should be reversed.

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November 29, 1996

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